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IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF SEATTLE, EXECUTIVE SERVICES DEPARTMENT,

Respondent.

FORD MOTOR COMPANY,

Petitioner,

v.

CITY OF TACOMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. RESPONDENTS' READING OF *TYLER PIPE* EVISCERATES THE FAIR APPORTIONMENT REQUIREMENT.

Respondents' Brief in Opposition, like the decision below, rests on an overbroad reading of *Tyler Pipe* that, on the undisputed facts of this case, makes a mockery of the fair apportionment requirement. Despite this Court's declaration in *Jefferson Lines* that a gross receipts tax on business activities is a "variety of tax on income, which [is]

required to be apportioned to reflect the location of the various interstate activities by which it was earned" (514 U.S. at 190), respondents unabashedly defend the unapportioned taxes they have imposed on *all* of the receipts from Ford's interstate wholesaling activities, even though *none* of the actual sales giving rise to those receipts occurred within the Cities.

The principal support for this extreme position is the statement in *Tyler Pipe* that "the activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe*, 483 U.S. at 251. Respondents' reading of *Tyler Pipe* is not correct for several reasons.

First, this Court's *sole* focus in *Tyler Pipe* was on the question of whether "manufacturing" and "wholesaling" were a single "unitary" activity such that a tax on in-state wholesaling activities had to be apportioned to take into account out-of-state manufacturing activities. This Court's observation that wholesaling is a "separate activity" responded directly to the taxpayer's "erroneous assumption that ...Washington is taxing the *unitary* activity of manufacturing and wholesaling." 483 U.S. at 251 (emphasis added). Thus, this Court concluded that it was not appropriate to apportion the receipts derived from "separate" in-state wholesaling to reflect "separate" out-of-state manufacturing that might be taxed by another State.

Second, there are critical distinctions between the facts and records of *Tyler Pipe* and this case that reinforce the limitations on this Court's statement in *Tyler Pipe*. In that case, all of the wholesale sales and virtually all of the wholesaling activities presented in the record took place within the taxing jurisdiction. 483 U.S. at 249-50. Here, by contrast, as respondents acknowledge, none of the wholesale sales and very few of the wholesaling activities occurred within the taxing jurisdictions. App. 101a-109a; Br. Opp. 2.

Moreover, in *Tyler Pipe*, the taxpayer made no effort to justify apportionment based on any out-of-state wholesaling activity it may have undertaken. Here, in stark contrast, there is extensive record evidence detailing the substantial out-of-state wholesaling activity undertaken by petitioner with respect to which apportionment is clearly appropriate. App. 32a-34a; 100a-112a. In short, when this Court stated in *Tyler Pipe* that wholesaling activity is a separate activity "conducted wholly within Washington," that statement must necessarily have referred only to the facts of the case before it. The instant case establishes beyond doubt that taxable "wholesaling" activities that result in the shipment of goods to local customers can and in fact do take place in multiple jurisdictions.[1]

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[1] Respondents' suggestion that "[t]wo decades ago, Ford made the same argument it is making here" (Br. Opp. 8), because it "was one of more than 50 plaintiffs whose cases were consolidated in the state court actions that resulted in this Court's *Tyler Pipe* decision" (*id.* at n.4), is wrong on two counts. Not only was the apportionment argument advanced here never advanced in *Tyler Pipe* for the reasons set forth above,

Finally, and most fundamentally, an elevation of *Tyler Pipe*'s context-specific observation into a general rule of law that "wholesaling" must in all circumstances be viewed as an activity conducted "wholly within" a single State, and that "no other State has jurisdiction to tax" such activity, is a retreat into the very formalism having "no relationship to economic realities" that this Court was determined to abandon in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Indeed, to suggest that Michigan, or any other State where petitioner transfers title to the vehicles it sells to dealers located in the Cities, has no "jurisdiction to tax" the portion of petitioner's wholesaling activity that indisputably occurs within that State not only would ignore "economic realities," it would constitute novel law as well.

In short, respondents' position is that gross receipts taxes on business activities need not be apportioned when they are measured by receipts from the sale of goods shipped into a taxing jurisdiction where some wholesaling activities occurred, regardless of the extent of the out-of-state wholesaling activities (including the sale itself) that resulted in those shipments. That position simply cannot be reconciled with the bedrock principle that a business gross receipts tax is "required to be apportioned to reflect the location of the various interstate activities by which it was earned."

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but Ford was not involved in the apportionment controversy in *Tyler Pipe*. Its involvement was limited to the taxpayers' successful challenge to the "multiple activities" exemption in Washington's gross receipts tax, which this Court struck down because it discriminated against interstate commerce.

Jefferson Lines, 514 U.S. at 190. Only if the Cities are limited to taxing their fair share of the sales receipts, reflecting only that portion of the interstate wholesaling activities that occur within their respective jurisdictions, can one avoid the "opportunities . . . for multiple taxation of the same taxpayer" that this Court said must be avoided when interstate commerce is being taxed. *Id.* *See also id.* at 184 (". . .multiple taxation. . .is threatened whenever one State's act of overreaching combines with the *possibility* that another State will claim its fair share of the value taxed . . . .") (emphasis added).

At the very least, if there is any prospect that respondents' reading of *Tyler Pipe*, rather than petitioner's reading of *Jefferson Lines*, accurately reflects the current state of Commerce Clause jurisprudence with respect to gross receipts taxation of interstate commercial activity, it is incumbent upon this Court to clear up the existing uncertainty over this question.

II. THERE IS NO EXCEPTION TO *JEFFERSON LINES'* APPORTIONMENT REQUIREMENT FOR A GROSS RECEIPTS TAX ON BUSINESS ACTIVITIES WHEN THE TAX IS MEASURED BY RECEIPTS FROM THE SALE OF GOODS .

A. *Jefferson Lines* Did Not Recognize an Exception to the Apportionment Requirement It Articulated

This Court's declaration in *Jefferson Lines* that a gross receipts tax on business activities is "simply a variety of tax on income, which [is]

required to be apportioned to reflect the location of the various interstate activities by which it was earned," does not contemplate any exception for taxes measured by receipts from the sale of goods merely because they are shipped into the taxing jurisdiction. *That is particularly so in a case like this, where the actual sales of the goods and most of the wholesaling activities associated with those sales occurred in other States.*

First, nothing in this Court's language in *Jefferson Lines* suggests any such exception.

Second, this Court's elaboration on the reason for the rule belies the existence of such an exception. This Court drew a sharp line between sales taxes, like the tax at issue in *Jefferson Lines*, and business gross receipts taxes, like the tax at issue here. This Court observed that a sales tax on goods or services is a tax on a "discrete" (*id.* at 186) or "local" (*id.* at 188) "event" (*id.* at 186, 188), with the tax falling on the purchaser on a transaction-by-transaction basis, and with no appreciable risk of multiple taxation. Consequently, this Court has "consistently approved taxation of sales without any division of the tax among different States . . . ." *Id.* at 186.

By contrast, this Court further observed, a business gross receipts tax falls on the "seller-taxpayer" (*id.* at 190), not with respect to a discrete, geographically identifiable "event," but rather with respect to a series of activities that may cross state lines. In these circumstances, there are "consequent opportunities . . . for multiple taxation of the same taxpayer" (*id.* at 190) and the tax is "required to be apportioned to reflect the location of various

interstate activities by which it was earned." *Id.* Nowhere in this analysis is there any room for an exception to the fair apportionment requirement for a business gross receipts tax merely because the measure of the tax is receipts from the sale of goods rather than from the sale of services, especially when as here the wholesaling activities generating those receipts are conducted in multiple states.

Respondents and the majority below attempt to obfuscate this clear distinction. On the one hand, they emphasize that the Cities' taxes are taxes on "business activities," as distinguished from a "sales tax." Br. Opp. 1. Thus "it does not matter in which jurisdiction the actual sales at wholesale occur." App. 9a. On the other hand, and at the very same time, they rely on the sales tax analogy by claiming the right to impose an unapportioned tax "measured by 100 percent of the gross receipts from interstate *sales* of goods *delivered to and accepted in* the taxing jurisdiction." Br. Opp. at 3-4 (emphasis added).[2]

But the Cities cannot have it both ways. Either their tax is an activities tax, which allows them to consider receipts from out-of-state sales in the measure *but requires apportionment of that measure to reflect only the portion of the receipts generated by activity within its borders,* or the tax is

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[2] It is unclear what respondents mean by this phrase (other than "destination") since the record in this case shows that under the terms of the sales contracts, delivery was made at the out-of-state point of origin. In fact, the out-of-state delivery was a major source of the majority's rift with the dissent causing the majority to expressly hold that, "it does not matter in which jurisdiction the actual sales at wholesale occur." App. 9a.

a sales tax, which can be imposed on an unapportioned basis, *but only when the taxable event is a local event that can occur exclusively within the taxing jurisdiction, thereby avoiding the risk of multiple taxation.* In short, the Cities cannot treat their taxing scheme as a gross receipts tax for purposes of imposing the tax and as a sales tax for purposes of determining whether apportionment is required.

Finally, the constitutional policy underlying the fair apportionment requirement militates against any exception for gross receipts taxes measured by receipts from the out-of-state sale of goods shipped to the taxing jurisdiction. Just as this Court in *Jefferson Lines* found no reason to distinguish between goods and services as to the *lack of an apportionment requirement* for sales tax purposes, because "[a] sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery" (514 U.S. at 188), there is also no rational basis for distinguishing between goods and services as to the *existence of an apportionment requirement* for business gross receipts tax purposes.

In *Jefferson Lines*, this Court declared that apportionment was required when a "seller-taxpayer was exposed to gross receipts taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety." *Id.* at 190. In the instant case, the "seller-taxpayer" is similarly exposed to taxation by other States on portions of the same receipts that Seattle and Tacoma are taxing in their entirety. The fact that

the tax described in *Jefferson Lines* was measured by gross receipts from the sale of services, while the tax at issue here is measured by gross receipts from the sale of goods, is a distinction without constitutional significance.

B. State Court Decisions Are In Conflict Over the Meaning of *Jefferson Lines*

Respondents' claim that the decision below does not conflict with decisions of other state courts (Br. Opp. 3-7) is predicated on the same faulty premise that underlies its effort to distinguish *Jefferson Lines*, namely, that these cases implicitly recognized an exception to the rule requiring apportionment of gross receipts taxes when the tax is imposed on receipts from the sale of goods shipped into the taxing jurisdiction. In point of fact, these other state court decisions, which uniformly applied *Jefferson Lines* to require apportionment of gross receipts taxes (Pet. 10-14), reflect an understanding of *Jefferson Lines* that is fundamentally at odds with the position of the majority below.

For example, respondents suggest there is no conflict between the decision below and *City of Winchester* because the City of Winchester sought to tax the entire gross receipts of a company that operated in many states and, unlike the Cities here, did not "limit the measure of their . . . taxes to goods delivered . . . in the Cities." Br. Opp. 4. But respondents ignore the essential holding in *City of Winchester*, reflecting this Court's opinion in *Jefferson Lines*, that taxing receipts "from value produced in locations other than in the taxing jurisdiction" (471 S.E.2d at 498) gave rise to a risk of

multiple taxation and a requirement of apportionment. For reasons detailed above, precisely the same risk exists here. That Winchester's overreaching to tax value produced in other locations was even more egregious than the overreaching in question here is of no constitutional significance. The same is true of respondents' effort to distinguish *M & Associates* (Br. Opp. 4), which struck down an Alabama local gross receipts tax similar to the City of Winchester's tax.

Respondents' effort to distinguish *Philadelphia Eagles* on the ground that it involved a "tax on royalties earned from media contracts, not a tax on the sale of goods" (Br. Opp.4) fails on two counts. First, it relies on a distinction between goods and services that, as discussed above, has no constitutional significance. Second, it contradicts respondents' own characterization of the Cities' taxes at issue here, which respondents strenuously insist are taxes on "business activity," not on the "sale of goods." Br. Opp. 1-3.

Respondents' discounting of the *Northwood* and *Southern Pacific* cases suffers from similar defects. Both of those cases explicitly recognized *Jefferson Lines'* requirement that "gross receipts taxes . . . must be apportioned to comply with the dormant Commerce Clause." *Southern Pacific*, 44 P.3d at 1014; *accord*, *Northwood*, 856 A.2d at 804-05; *see* Pet. 12-14. Respondents' only riposte is that those cases involved gross receipts taxes on services rather than goods (Br. Opp. 6-7), and their unsubstantiated assertion that, if the cases had involved goods, the taxing jurisdictions would have taken the same constitutionally questionable

approach to taxing petitioner that the Cities take here. Br. Opp. 5, 7.

III. RESPONDENTS' OTHER ARGUMENTS FOR DENYING REVIEW LACK SUBSTANCE

A. Petitioner Is Not Seeking Judicial Imposition of a Particular Apportionment Formula on the Cities

Respondents contend that petitioner is seeking to replace the Cities' unapportioned tax with "an apportionment system involving the originating location, the delivery location, and any other location where any other activity related to the sale occurs." Br. Opp. 14. Respondents claim this would not prevent double taxation "unless the Court imposed the same apportionment system on all taxing authorities." *Id.* at 14-15.

To the contrary, petitioner is not insisting on any particular apportionment methodology; indeed, it suggested a number of alternatives in the trial court. Affidavit of Christopher Mucke in Opposition to Seattle's Motion for Partial Summary Judgment, Seattle CP 360; Affidavit of Christopher Mucke in Opposition to Tacoma's Motion for Partial Summary Judgment, Tacoma Tr. Ex. 5. Petitioner also recognizes that different jurisdictions may use different apportionment formulas. What petitioner does not accept – and what it should not be constitutionally required to accept – is the substantial risk of multiple taxation that inexorably arises from a taxing jurisdiction's *absolute* refusal to apportion the gross receipts derived from interstate

business activity. It is the Cities' refusal to recognize *any* claim of other jurisdictions to tax that portion of the receipts attributable to economic activity occurring in their jurisdictions that renders the Cities' tax regimes constitutionally unacceptable.

B. The Purported Relief That the Cities Provide From Double Taxation Is Illusory

The Cities contend that they offer a deduction that purportedly relieves taxpayers engaged in interstate commerce from the double taxation to which they may be subjected as a result of taxes imposed on the same receipts that the Cities seek to tax on an unapportioned basis. The deduction provides:

> A taxpayer that has paid an eligible gross receipts tax with respect to a sale of goods . . . *to a jurisdiction in which the goods are delivered* . . . may deduct an amount equal to the gross receipts used to measure the tax from the measure of the tax owed to the City.

Br. Opp. 13, n.6 (quoting Seattle and Tacoma codes) (emphasis added).

This deduction is illusory. Under respondents' view of the case, because physical delivery occurs in the Cities, the risk of multiple taxation can arise *only* with respect to that portion of petitioner's gross receipts that reflect wholesaling activity carried on in jurisdictions where the goods *are not* delivered. But the deduction is specifically conditioned on

delivery in another jurisdiction. The deduction thus provides no possible relief for petitioner here.

Moreover, by allowing a deduction when delivery occurs elsewhere, respondents must believe they are entitled to impose their "activities" tax even when the goods are *not* delivered in their jurisdictions. Delivery therefore cannot be the "winner take all" element that respondents claim it to be.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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